No. 2972

IN THE

# United States Circuit Court of Appeals

FOR THE

## NINTH CIRCUIT

CRYSTAL LAUNDRY COMPANY,
a corporation, and
PERCY G. ALLEN,
*Appellants,*

vs.

BROWN-MEYER COMPANY,
a corporation,
*Appellee.*

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*Appeal from the District Court of the United States for the District of Oregon.*

## APPELLEE'S SUPPLEMENTAL BRIEF.

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## APPELLEE'S SUPPLEMENTAL BRIEF.

### STATEMENT

This and a companion case in this Court, entitled Broadway Towel Supply Company, a corporation, and Amos Burg, Appellants, No. 2971, were tried as one in the Court below under stipulation that the evidence

should apply equally to both cases, and were heard as one on appeal in this Court.

Since, therefore, briefs have been filed in both cases here, and a Supplemental Brief has been filed in said case No. 2971, it would appear not out of order and economical of time to supplement the original brief herein by reference only to such points of difference between this case and its said companion as claim attention.

If that view is accepted, as, under the circumstances Counsel trusts it may be, this Honorable Court is requested in disposing of this case to take into consideration points of the Supplemental Brief filed in said case No. 2971 that are common to the present one, and in addition thereto, in any event, the following touching upon points of differentiation between the two cases.

This brief is filed under permission of this Court granted at the oral argument of this case.

## POINTS DISCUSSED.

It appears well to consider the points of difference between this and case No. 2971 under two heads: first, the form and mode of the Appeal taken, and, second, the matter thereof.

### I.

### THE FORM AND MODE OF THE APPEAL.

This case and case No. 2971 proceeded, *pari passu,* to the point of entry of "Decree for Injunction and Accounting" (Transcript pp. 17-20) and reference to a Master (Transcript p. 20).

At that point the course of the two cases diverge, in consequence of plaintiff below (Appellee) having filed in this case a "Motion to Punish Defendants for Contempt.' (Transcript pp. 20-21).

To that Motion Defendants made Answer (Transcript pp. 24-27), and, thereupon, the Court below entered what is entitled "Supplemental Decree" .(Transcript pp. 29-31).

Said "Supplemental Decree" was followed by "Motion to Vacate" the same (Transcript pp. 31-32), and, at the same time by "Motion for leave to file Supplemental Answer" (Transcript pp. 46-47), accompanied by "Petition for leave to file Supplemental Answer and take Proofs thereon" (Transcript pp. 47-52), together with "Proposed Supplemental Answer" (Transcript pp. 53-56).

Said petition and motion were denied by the Court below in an order (Transcript pp. 57-58) in which is noted Plaintiffs' statement of their desire to appeal and the penalty of appeal bond fixed.

Denial of "Petition for leave to file Supplemental Answer" is made the subject of a separate order (Transcript pp. 58-59).

Petition on Appeal (Transcript p. 62), accompanied by presentation of "Assignment of Errors" (Transcript pp. 59-61) and by "Bond on Appeal" (Transcript pp. 63-65) was allowed under order dated April 20, 1916 (Transcript p. 63) and the bond was approved the day following (Transcript p. 65).

The Petition on Appeal (Transcript p. 62) reads, *inter alia,* as follows:

"The above named defendants, conceiving themselves aggrieved by the supplemental decree in the above-entitled suit entered March 21, 1916, whereby this Court did extend and continue the injunction herein issued pursuant to the interlocutory decree entered January 21, 1916, to a certain towel rack adopted and used by defendants since the entry of said inlocutory decree, and furthermore, conceiving themselves aggrieved by the order entered herein April 17, 1916, refusing to dissolve and vacate said supplemental decree on the motion of defendants based on their petition verified April 5, 1916;

THEREFORE, the defendants do hereby appeal" * * *

Appeal appears from said petition to be directed against (1) entry of Supplemental Decree of March 21, 1916 (Transcript pp. 29-31), not against the Interloctutory Decree entered January 31, 1916.

(2) "Order denying Motion to vacate Supplemental Decree" (Transcript pp. 57-58) dated April 17, 1916.

It should be noted that the order last above referred to is identified as being based on petition "verified April 5, 1916" (Transcript p. 62—compare page 57).

## RESTRICTED SCOPE OF APPEAL.

From the foregoing it appears that no final decree has been rendered by the Court below, and that the appeal is directed only against the Supplemental Decree of March 21, 1916 (Transcript pp. 29-31), and the

order Denying Motion to Vacate the same (Transcript pp. 57-58).

No appeal is taken from the "Decree for Injunction and Accounting," entered January 31, 1916 (Transcript pp. 17-20) and none from "Order denying defendants leave to file Supplemental Answer" (Transcript pp. 58-59).

The difficulty encountered by Counsel for Appellee in attempting to determine what the issue in this case, whether arrived at or not, is intended to be, has already been pointed out in Appellee's Brief.

That point need not be further enlarged upon. The aim of this Supplemental Brief is to indicate for the benefit of the Court certain matters that might appear to be included in the Assignment of Errors, but which are in fact excluded from review on this Appeal.

Appellants in their Brief (page 38) submit to consideration the scope of the Brown patent—the one in suit.

In reply, it is submitted that that question, if before this Court at all, is not raised broadly, because as will appear from examination of the several Assignments of Error, discloses no objection to the Decree of January 31, 1916 (Transcript pp. 17-20).

The Injunction therein granted is not affected because, for one sufficient reason, the Appeal was not taken within thirty days of its entry (Act of Congress, March 31, 1891, C. 517, Sec. 7, 26 Stat. 828).

If the supplemental decree of March 21, 1916 (Transcript pp. 29-31) referred to in Assignments of Error I and II involved an injunction "granted, continued, refused or dissolved" as (provided for in Act of

Congress March 3, 1911, C. 231, Sec. 129, 36 Stat. 1134 —Supplemental to Act of March 31, 1891, above noted) it is doubtful whether Appeal thereunder is well taken in this case, since the Statute provides that "appeal must be *taken* within thirty days from the *entry*" of the order or decree appealed from. The record fails to show the date of "entry" of the Supplemental Decree (Transcript pp. 29-31) and fails to show that the appeal was "taken" within thirty days thereafter.

But this point is unimportant if, as Appellee regards it, said Supplemental Decree does not come under the provisions of said Statute. Said decree is upon "Motion to punish Defendants for Contempt" (Transcript pp. 20-21). Defendants' Answer thereto (Transcript pp. 24-27) offers an explanation for violation of the injunction, and the Court below in said decree accepts it in condonement of the offense.

In Assignment of Error I (Transcript pp. 59-60) Appellants refer to said Decree as "extending and continuing the injunction" of January 31, 1916.

This statement appears to be incorrect. The decree is that a certain modified device, described therein (Transcript p. 29), "infringes" upon the patent in suit, and that it "*constitutes* a violation of the injunction heretofore granted and issued in this cause."

The proceedings raise no question in regard to the injunction, and it stands in no wise affected by them.

## II.

## MATTER OF SUPPLEMENTAL DECREE.

In respect to the infringing modification (Transcript p. 29) printed cut inserted between pages 38 and

39 of the Transcript is assumed by Appellants to represent it. Objection is made to said cut that it is not in evidence; that it fails to make any complete or adequate showing of the object it is assumed to represent; and that, so far as it goes, the showing it makes fails to correspond with the description made by the Court of the modified device which was before the Court below at the hearing upon which the Supplemental Decree was granted (See Transcript p. 29).

In support of the decision rendered under contempt proceedings and the conclusion therein reached as reflected in said Supplemental Decree, counsel submits the following citations:

> The attempt of a defendant who has been enjoined from infringement to see how near he can come to an infringement and escape it is not looked upon with favor by the Courts. That he acted under advice of counsel is no defense.
>
> Calculagraph Co. vs. Wilson, 136 Fed. 196.

> He should be careful to avoid other infringement.
>
> Blair vs. Jeanette-McKee Glass Works, 161 Fed. 355.

> Not excused by reason of the fact that the infringement was not an obvious one, and that defendants proceeded under advice of counsel.
>
> Paxton vs. Brinton, 126 Fed. 542.

> Not excused even though infringing device is made according to a junior patent.

Norton vs. Eagle Auto Can Co., 59 Fed. 137.

Applying Blanchard vs. Putnam, 8 Wall. 420.

In the following case before the Circuit Court of Appeals for the second circuit, the Court says:

> "In deciding that the defendant had violated the injunction, the Court necessarily passed upon whether defendant had sold the valves, and whether the valves were an infringement of the Complainant's patent.
>
> Upon writ of error the Court cannot review questions of fact. Its review is confined to questions of law only.
>
> This is the rule when contempt proceedings are under review."
>
> Christensen Engineering Co. vs. Westinghouse Air Brake Co., 135 Fed. p. 778 (2 C. C. A.).
>
> Citing *in re* Debs, 154 U. S. 564.
>
> Besette vs. Conkey Co., 194 U. S. 334.

Any other question that might be held to be raised by this appeal must, it is submitted, amount to specification as error of Refusal of new Trial.

> Refusal by inferior Court to grant a new trial is not error.
>
> Henderson vs. Moore, 9 U. S. (5 Cranch) 11.
>
> Marine Ins. Co. vs. Hodgson, 10 U. S. (6 Cranch) 206.

Respectfully submitted,

JOSEPH L. ATKINS,

Counsel for Appellee.